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**UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEVADA**

In Re:

Case No.: BK-S-09-31603-MKN
Chapter: 7

WILLIAM GAYLER,

Debtor.

DAVID A. ROSENBERG, Chapter 7 Trustee,

Plaintiff,

V.

23 GOLDEN SUNRAY, L.L.C.; ALTRA VIDA,
L.L.C.; APAN WINE, LIMITED LIABILITY
COMPANY; AXIOS-TC, LIMITED
LIABILITY COMPANY; BYRON LEBOW, as
Trustee of THE BYRON LEBOW
REVOCABLE FAMILY TRUST; CH.
ANGELUS LLC; CH. ANGELUS II LLC; CH.
ANGELUS III, LIMITED LIABILITY
COMPANY; CH. PICHON I, LLC; DOMINUS
M-B, L.L.C.; EDWARD BROWN; GROTH
LIMITED LIABILITY COMPANY; HARLAN,
LLC; ICON HOLDING COMPANY LLC;
ICON REAL ESTATE COMPANIES, INC.;
ICON REAL ESTATE DEVELOPMENT,
LIMITED LIABILITY COMPANY; IPS II,
LIMITED LIABILITY COMPANY; MARTIN
BARRETT; MARYELLEN BROWN;
MERITAGE-GAYLER LIMITED LIABILITY
COMPANY; MORPHEUS ENTERPRISES,
LLC; POLYRUS LIMITED LIABILITY
COMPANY; THE GAYLER FAMILY
EDUCATIONAL, LLC; WALTER
LOERWALD a/k/a LEROY LOERWALD;

Adversary Proceeding No. 11-01410-MKN

**TRUSTEE'S MOTION TO SET
ASIDE/VACATE, OR IN THE
ALTERNATIVE, TO RECONSIDER**

Hearing Date: April 22, 2013
Hearing Time: 1:30 p.m.

1 WILLIAM A. GAYLER d/b/a ICON REAL
 2 ESTATE SERVICES; WILLIAM A. GAYLER,
 3 as General Partner of TGF HOLDING LIMITED
 4 PARTNERSHIP; WILLIAM A. GAYLER, as
 5 Trustee of THE GAYLER 2001
 6 IRREVOCABLE TRUST; WILLIAM A.
 7 GAYLER, as Trustee of THE JAYDEN
 KRISTOPHER GAYLER IRREVOCABLE
 TRUST; WILLIAM A. GAYLER, as Trustee of
 THE WILLIAM A. GAYLER SEPARATE
 PROPERTY TRUST; WILLIAM GAYLER,
 individually; DOES I-X and ROE
 CORPORATIONS I-X, inclusive,

8 Defendants.

9

10 **TRUSTEE'S MOTION TO SET ASIDE/VACATE,
 OR IN THE ALTERNATIVE, TO RECONSIDER**

11 David A. Rosenberg, the duly appointed Chapter 7 Trustee in the above-entitled
 12 bankruptcy case (hereinafter "Trustee"), by and through his counsel, Phillip S. Aurbach, Esq. and
 13 Jessica M. Goodey, Esq. of Marquis Aurbach Coffing, hereby moves this Court for an order to
 14 set aside or vacate the ruling on Barrett's Motion to Dismiss, or in the alternative, the Trustee
 15 requests this Court reconsider its ruling on Barrett's Motion to Dismiss. Additionally, the
 16 Trustee requests an order of the Court setting aside the portion of the ruling on the Gayler
 17 Defendant's Motion to Dismiss relating to Claims for Relief 28, 29 and 30. This Motion is based
 18 upon the following Memorandum of Points and Authorities, the attached exhibits, the entire case
 19 file and any oral argument this Court may wish to entertain.

20 **MEMORANDUM OF POINTS AND AUTHORITIES**

21 **I. INTRODUCTION**

22 On November 30, 2012, this Court entered an Order dismissing Defendant Martin Barrett
 23 ("Barrett") for failure to state a claim in Claims for Relief 28 and 29 (Dkt# 257) (the "Order").
 24 The Order is now being relied upon by Walter Loerwald ("Loerwald") in an attempt to join
 25 Barrett in escaping culpability for their actions in defrauding the Estate and Gayler's creditors.
 26 See Dkt# 299. However, the Order must be vacated, based upon the Court's recent finding that
 27 Gayler owned or controlled TGF (Dkt# 305), which supports a finding of an alter ego
 28 relationship between Golden Sunray and Gayler. Upon a finding of such an alter ego

1 relationship, the Golden Sunray Property becomes property of the Estate, such that the Trustee
 2 may proceed with his claim against Barrett for post-petition and fraudulent transfer of Estate
 3 property. As such, the Order must be set aside to allow the Trustee to recover millions of dollars
 4 of Estate property fraudulently transferred to Barrett.

5 On October 25, 2012, the Court also dismissed Claims for Relief 28, 29 and 30 as to the
 6 Gayler Defendants, based upon the same finding supporting Barrett's Motion to Dismiss (that the
 7 Golden Sunray Property is not property of the Estate) (Dkt# 227) (the "October 25, 2012
 8 Order"). The Trustee also seeks to set aside the portion of the October 25, 2012 Order that
 9 relates to Claims for Relief 28, 29 and 30 as to the Gayler Defendants. The October 25, 2012
 10 Order also dismissed various other claims against the Gayler Defendants, while declining to
 11 dismiss other various claims. The Trustee is not seeking to vacate or set aside any other rulings
 12 contained in the October 25, 2012 Order.

13 **II. STATEMENT OF FACTS**

14 The following five undisputed facts are relevant to the instant Motion:

15 1. On October 25, 2012, this Court entered an Order dismissing Claims 28, 29 and
 16 30 as to the Gayler Defendants (Dkt # 227).

17 2. On November 30, 2012, this Court entered an Order dismissing Defendant Martin
 18 Barrett (the "Order") (Dkt# 257).

19 3. On January 30, 2013, the Court found that it is undisputed that Gayler owns or
 20 controls TGF Holdings, LP ("TGF") (Dkt# 305).

21 4. TGF owns 100% of 23 Golden Sunray, LLC ("Golden Sunray"). (Dkt# 105).

22 5. At the time of the filing of the Involuntary Petition (the "Petition") Golden Sunray
 23 owned a piece of real property located at 23 Golden Sunray Lane, Las Vegas, Nevada (the
 24 "Property").¹

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 26
 27 ¹ See Statement of Undisputed Facts in Support of Trustee's Motion for Partial Summary Judgment as to
 28 Claim for Relief No. 18, filed concurrently herewith ("Undisputed Facts") at ¶ 6.

1 Additionally, the Trustee repeats and incorporates all undisputed facts set forth in the
 2 Trustee's Motion for Summary Judgment as to Claim No. 18 and the Trustee's Opposition to
 3 Loerwald's Motion for Judgment on the Pleadings, filed concurrently herewith.

4 **III. LEGAL ARGUMENT**

5 **A. STANDARD FOR RELIEF FROM ORDER**

6 After ruling on and entering a dismissal order, bankruptcy courts have the equitable
 7 power to revisit the order by way of reconsideration. *Zurich Am. Ins. Co. v. Int'l Fibercom, Inc.*
 8 (*In re Int'l Fibercom, Inc.*), 503 F.3d 933, 940 (9th Cir. 2007). This equitable power has been
 9 formalized in Rule 9024, which makes Federal Rule of Civil Procedure 60(b) applicable in cases
 10 under the Code. *Id.*; *see also In re AVI, Inc.*, 389 B.R. 721, 729-30 (B.A.P. 9th Cir. 2008). The
 11 Ninth Circuit has observed that the court's discretion to revisit past orders is broad in the absence
 12 of "vested" rights. *Int'l Fibercom*, 503 F.3d at 944. Moreover, FRCP 60(b) conditions all relief
 13 on "such terms as are just" which is understood to implicate equitable principles. *In re AVI*, 389
 14 B.R. at 730. The application of equitable principles includes the question whether intervening
 15 equities make relief inappropriate, which is often couched in terms of whether "prejudice" would
 16 result from granting relief. *Id.* at nn. 5–6.

17 Thus, in applying the conventional Rule 60 analysis, the first question is whether the
 18 motion was brought within a "reasonable" time, which must not be more than one year following
 19 the entry of the order. *Id.*; *see also* FRCP 60(c). The next question is whether intervening
 20 equities make vacating the dismissal inappropriate. *Id.*

21 Here, the Motion was brought within a "reasonable time." Specifically, the Order was
 22 entered November 30, 2012, and the instant Motion is filed less than three (3) months since the
 23 entry of the Order—well before the one-year period. Additionally, the basis for bringing the
 24 instant Motion—the Court's finding that Gayler owned or was in control of TGF—was entered
 25 on January 30, 2013 (Dkt# 305). Thus, the instant Motion is brought less than thirty (30) days
 26 after the basis for the Motion arose. As such, the Motion was brought within a reasonable time.

27 As it pertains to the second part of the Court's analysis—whether prejudice will result
 28 from vacating the dismissal—a review of the circumstances demonstrates that Barrett will not be

1 prejudiced by a vacation of the dismissal. Indeed, the opposite is true, in that if the dismissal is
 2 not vacated, the Estate and the creditors will suffer extreme prejudice, as Barrett will have
 3 escaped liability for his actions which resulted in the Estate and the creditors losing millions of
 4 dollars in equity of the Property.² The Estate and the creditors will suffer more prejudice, as the
 5 Order, which was entered prior to a finding that Gayler was in control of TGF, which is the
 6 current owner of Golden Sunray, is being relied upon by Loerwald to support the dismissal of
 7 Loerwald, such that neither the Estate nor the creditors can recover the millions of dollars that
 8 were transferred to Loerwald through the foreclosure of the Property.³ Barrett, on the other
 9 hand, will suffer no prejudice, as trial has not yet occurred, and therefore, Barrett may still
 10 actively participate in the litigation and defend the claims against him. This is further supported
 11 by the fact that Barrett is represented by the same counsel representing Loerwald, such that
 12 Barrett's counsel is fully apprised of the proceedings and has been able to participate in all
 13 discovery that has occurred since Barrett's dismissal.⁴ As such, Barrett will not be prejudiced by
 14 the vacation of the dismissal, such that the Order must be set aside based upon the Court's recent
 15 finding that Gayler is in control of TGF. The same analysis applies to any alleged prejudice by
 16 the Gayler Defendants, as the Gayler Defendants have continued to be active parties in the
 17 litigation, and therefore will suffer no prejudice.

18 **B. THE ORDER MUST BE SET ASIDE BECAUSE THE PROPERTY WILL**
 BE PROPERTY OF THE ESTATE UPON A FINDING OF AN ALTER
 EGO RELATIONSHIP BETWEEN GAYLER AND GOLDEN SUNRAY.

20 A finding that Golden Sunray is alter ego of Gayler means that Gayler and Golden
 21 Sunray are the same entity. Additionally, because the assets of an alter ego are essentially the
 22 assets of the bankruptcy estate, it is fair to allow the trustee to pursue those assets. *Towe v.*
 23 *Martinson*, 195 B.R. 137, 141 (D. Mont. 1996). Thus, upon a finding of an alter ego relationship
 24

25 ² See generally Dkt# 80 (Claims 28, 29 and 30).

26 ³ See Dkt# 299.

27 ⁴ Indeed, outside of Loerwald's first supplemental disclosure, and a small supplemental production of
 28 documents by the Trustee, little additional discovery has occurred since Barrett was dismissed.

1 between Golden Sunray and Gayler, any assets held by Golden Sunray can be found to have
 2 been held by Gayler personally, including, but not limited to, the Property.

3 At the time of the Order, the Court had not been briefed on the issue of Gayler's control
 4 of the various entities. However, upon the Trustee's discovery of such evidence and the filing of
 5 the Motion for Partial Summary Judgment pursuant to 11 U.S.C. § 727, the Court determined
 6 that there is no dispute that Gayler was the owner or in control of TGF. (Dkt# 305 at 5:21–6:3).
 7 Moreover, at all relevant times, TGF was the manager of 23 Golden Sunray. *Id.*

8 This new finding supports the Trustee's claim that Golden Sunray is the alter ego Gayler,
 9 as set forth in the Trustee's Motion for Partial Summary Judgment as to Claim No. 18, filed
 10 concurrently herewith. More specifically, the Property was held by Golden Sunray at the time of
 11 the filing of the Petition. Golden Sunray was owned 100% by TGF. Thus, upon a finding of an
 12 alter ego relationship, Golden Sunray and Gayler will be deemed to be the same entity, and
 13 therefore, the Property will be deemed to be property of Gayler at the time of the filing of the
 14 Petition. Thus, the Trustee may pursue Barrett, Loerwald and Gayler to recover the millions of
 15 dollars they received as a result of the "friendly" foreclosure proceeding.⁵ Accordingly, upon
 16 such a finding, the Trustee's 28th, 29th and 30th claims for relief adequately state a valid claim
 17 against both Barrett and Loerwald (i.e., claims for fraudulent and post-petition transfers). As
 18 such, the Court's ruling that the Trustee did not state a valid claim is in error and must be set
 19 aside and/or vacated.

20 **IV. CONCLUSION**

21 Based upon the Court's recent ruling that Gayler owned or was in control of TGF (which
 22 owns Golden Sunray), the Order dismissing Barrett for failure to state a claim must be set aside
 23 as it is now in error. Indeed, if the Court finds an alter ego relationship between Golden Sunray
 24 and Gayler (as set forth in the Motion for Summary Judgment, filed concurrently herewith), the
 25 Property becomes property of the Estate, such that the Trustee has a valid claim against Barrett
 26 and Gayler for fraudulent and post-petition transfer of Estate assets. The instant Motion is timely

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 28

⁵ See 11 U.S.C. §§ 548–550.

1 filed and neither Barrett nor Gayler will suffer prejudice as a result of the vacation. As such, the
2 Trustee respectfully requests that the Order (Dkt. # 257) be set aside and/or vacated.
3 Additionally, the Trustee respectfully requests that the portion of the October 25, 2012 Order
4 (Dkt. # 227) dismissing Claims 28, 29 and 30 as to the Gayler Defendants be set aside and/or
5 vacated.

6 Dated this 26th day of February, 2013.

7 MARQUIS AURBACH COFFING
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9
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